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SERVICE DATE – DECEMBER 19, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33984

BOREALIS INFRASTRUCTURE TRUST MANAGEMENT INC., SOLE TRUSTEE OF THE  
BOREALIS TRANSPORTATION INFRASTRUCTURE TRUST–ACQUISITION  
EXEMPTION–DETROIT RIVER TUNNEL COMPANY

STB Finance Docket No. 34005

CANADIAN PACIFIC RAILWAY COMPANY–CORPORATE FAMILY TRANSACTION  
EXEMPTION–INTERESTS IN DETROIT RIVER TUNNEL AND NIAGARA RIVER  
BRIDGE

STB Finance Docket No. 34007<sup>1</sup>

CANADIAN NATIONAL RAILWAY COMPANY–CORPORATE FAMILY TRANSACTION  
EXEMPTION–INTEREST IN DETROIT RIVER TUNNEL AND NIAGARA RIVER BRIDGE

Decided: December 17, 2001

Canadian National Railway Company (CNR) and Canadian Pacific Railway Company (CPR) have undertaken a series of transactions that affect the ownership interests of two international crossing points between the United States and Canada. These interests involve the Detroit River tunnel between Detroit, MI, and Windsor, ON (Tunnel), and the railway bridge between Niagara Falls, ON, and Niagara Falls, NY (Niagara Bridge). In the above-captioned dockets,<sup>2</sup> the parties filed notices of exemption for these transactions and, concurrently, filed

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<sup>1</sup> These proceedings are not consolidated, but are being handled in a single decision for administrative convenience.

<sup>2</sup> These transactions are related to the following simultaneously filed verified notices of exemption: Canadian National Railway Company–Trackage Rights Exemption–Detroit River Tunnel Company, STB Finance Docket No. 34001; Canadian Pacific Railway Company–Trackage Rights Exemption–Detroit River Tunnel Company, STB Finance Docket No. 34006; and Canadian Pacific Railway Company and Napierville Junction Railway Company–Corporate Family Transaction Exemption–St. Lawrence & Hudson Railway Company Limited, STB Finance Docket No. 34004. All of these transactions, including those considered  
(continued...)

motions to dismiss the notices of exemptions, alleging that no Board approval is required. We find that aspects of these transactions do require our approval or exemption, but that the particular notices of exemptions filed in these proceedings are not appropriate. Because we find the transactions in the public interest, however, we grant, sua sponte, appropriate exemptions to provide the parties with the necessary authorizations for the transactions.

## BACKGROUND

In 1984, the former Interstate Commerce Commission approved the acquisition by CNR and CPR of the Detroit River Tunnel Company (DRTC)<sup>3</sup> and Canada Southern Railway Company (CSR).<sup>4</sup> Canadian National Railway Company and Canadian Pacific Limited—Acquisition—Interests of Consolidated Rail Corporation in Canada Southern Railway Company and Detroit River Tunnel Company, Finance Docket No. 30387 (ICC served Sept. 4, 1984) (CNCP Acquisition). As part of the transaction for which they sought approval, CNR and CPR established a Canadian partnership, CNCP Niagara-Detroit Partnership (N-D Partnership), to own and operate these properties.<sup>5</sup> CNR and CPR each held a 50 percent interest in the N-D Partnership.

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<sup>2</sup>(...continued)

in this decision, were consummated, or were scheduled to be consummated, no later than March 2001.

<sup>3</sup> DRTC owned the Tunnel under the Detroit River between the cities of Windsor, ON, and Detroit, MI, which consisted of two bores and associated rights-of-way, trackage, and related facilities. The rail line of DRTC extended for a distance of 3.24 miles, between milepost 228.08 in Detroit, and milepost 224.84 in Windsor, of which approximately 1.79 miles were located within the United States. Of DRTC's 27.894 acres of real estate, approximately 12.853 acres were located in the United States.

<sup>4</sup> CSR controlled the Niagara River Bridge Company (NRBC), which owned the Niagara Bridge.

<sup>5</sup> N-D Partnership acquired ownership of all of the voting stock of CSR and DRTC and it leased the Niagara Bridge from CSR.

Through a series of transactions,<sup>6</sup> the ownership of DRTC, NRBC, and the leases that allow railroad operations through the Tunnel and over the Niagara Bridge have changed. The N–D Partnership has been dissolved and its interests were distributed in equal undivided shares to CNR and CPR.<sup>7</sup> CNR and CPR then immediately contributed their 50 percent interests in all of the non-Tunnel assets, including the stock of CSR and the Bridge lease, to a new partnership between CNR and CPR, the CNCP Niagara-Windsor Partnership (Niagara Partnership). Both CNR's and CPR's interests in the Tunnel were also distributed in equal shares to CNR and CPR. Simultaneously with the distribution, CNR sold its undivided one-half interest in DRTC, as well as its interests in certain improvements to the Tunnel and in the long-term lease of DRTC's property, to Borealis Infrastructure Trust Management Inc., the sole trustee of the Borealis Transportation Infrastructure Trust (BTIT). BTIT and CPR each then immediately contributed their undivided one-half interests in the Tunnel assets to a newly-created partnership between these parties, the Detroit River Tunnel Partnership (Detroit Partnership).<sup>8</sup> As a result of these transactions, CNR no longer owns any interest in the Tunnel.

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<sup>6</sup> CPR submitted under seal the following draft agreements that make these changes: Distribution Agreement among CPR, CNR and N–D Partnership; Dissolution Agreement between CPR and CNR; Partnership Agreement between CPR and Borealis Infrastructure Trust Management, Inc. (Borealis); Operating, Management and Maintenance Agreement among Detroit River Tunnel Partnership, CPR and Borealis; and Partnership Agreement between CPR and CNR. CNR submitted under seal the 3 draft agreements involving CNR. The Board granted motions for protective orders on March 14, 2001, in STB Finance Dockets Nos. 34005 and 34007.

<sup>7</sup> In 1996, CPR transferred its interests in the N–D Partnership, as well as trackage rights through the Tunnel and over the Niagara Bridge and connecting segments at both points, a leasehold interest in the rail properties of Napierville Junction Railroad Company, and the assignment of certain other overhead trackage rights by CPR, to St. Lawrence & Hudson Railway Company Limited (SLH). See Canadian Pacific Limited, Canadian Pacific Railway Company, and Napierville Junction Railroad Company—Corporation Family Transaction Exemption—St. Lawrence & Hudson Railway Company Limited, STB Finance Docket No. 33136 (STB served Oct. 9, 1996). Recently, SLH was absorbed back into its parent corporation, CPR. See Canada Pacific Railway Company and Napierville Junction Railway Company—Corporate Family Transaction Exemption—St. Lawrence & Hudson Railway Company Limited, STB Finance Docket No. 34004 (STB served Feb. 16, 2001).

<sup>8</sup> Under the pertinent agreements, CPR will dispatch trains and otherwise control operations in the Tunnel. All railroads in the Detroit area, however, will be able to use the Tunnel.

In an attempt to comply with the requirements of 49 U.S.C. 10901, BTIT filed a verified notice of exemption under 49 CFR 1150.31 to acquire CNR's undivided one-half ownership interest in DRTC. Borealis Infrastructure Trust Management Inc., Sole Trustee of the Borealis Transportation Infrastructure Trust–Acquisition Exemption–Detroit River Tunnel Company, STB Docket No. 33984 (STB served Mar. 22, 2001). At the same time, BTIT also filed a motion to dismiss its notice for lack of jurisdiction. BTIT argues that prior Board approval is not required for a noncarrier, such as BTIT, to acquire control of a railroad, particularly considering that BTIT will acquire only an undivided one-half ownership interest in the Tunnel assets. BTIT argues that no Board approval is required because neither owner will be able to control the railroad or railroad line within the meaning of 49 U.S.C. 11323-25.

CPR filed a verified notice of exemption under 49 CFR 1180.2(d)(3), which exempts certain intra-corporate transactions that do not significantly affect service. Canadian Pacific Railway Company–Corporate Family Transaction Exemption–Interests in Detroit River Tunnel and Niagara River Bridge, STB Finance Docket No. 34005 (STB served Mar. 22, 2001). Through this filing, CPR sought approval to hold its 50 percent interests in both the Detroit Partnership and the Niagara Partnership. CPR also filed a motion, similar to that of BTIT, to dismiss its notice for lack of jurisdiction. In addition to arguments put forth by BTIT, CPR argues that its transactions do not involve the consolidation or merger of rail carriers, the purchase, lease, or contract to operate property of a rail carrier, or acquisition of control of a rail carrier.

CNR also filed a verified notice of exemption under 49 CFR 1180.2(d)(3), through which it seeks approval of the acquisition of control of the Niagara Partnership. Canadian National Railway Company–Corporate Family Transaction Exemption–Interest in Detroit River Tunnel and Niagara River Bridge, STB Finance Docket No. 34007 (STB served Mar. 22, 2001). CNR argues that its notice should be dismissed because the Niagara Partnership does not purport to be a common carrier and will not function as such and because the Niagara Partnership will merely control railroad properties, only one of which is located partially within the United States. CNR also notes that it will control only a 50 percent interest in the Niagara Partnership.

## DISCUSSION AND CONCLUSIONS

The motions to dismiss the three notices of exemptions present the question of the extent to which our regulatory approval is required for the break up and distribution of N–D Partnership's United States assets, the creation of two new partnerships that will acquire those rail assets, and what appears to be a change in the operational control of the Tunnel. CNR and CPR have argued that, because in each instance, the partners will control only a 50 percent ownership interest in the two new partnerships being created, no control within the meaning of

49 U.S.C. 11323-25<sup>9</sup> exists, and therefore, that no Board approval is required.<sup>10</sup> Given the agency's prior approval of the joint acquisition and control of these rail assets by CNR and CPR, we agree with the parties that the 50 percent ownership interests described here would not by themselves be sufficient to establish control within the meaning of 49 U.S.C. 11323. But CPR's 50 percent ownership interest in Detroit Partnership now is coupled with its increased operational control over the Tunnel and, therefore, it is not clear that CPR would not need Board approval or exemption for this control. In an abundance of caution, we will grant CPR an exemption for control. Additionally, while we agree with the parties that BTIT and CNR would not require exemptions for their ownership interests in these transactions, we conclude that Detroit Partnership and Niagara Partnership are acquiring carrier assets through these transactions and thus they would require Board approval or exemptions. Because we find the transactions to be in the public interest, we will grant appropriate exemptions in this decision rather than penalizing the parties for incorrect or imprecise labeling of their notices of exemption. Moreover, for administrative convenience, we will grant the exemptions in the existing STB Finance Dockets.

The Notices of Exemption. The acquisition of an active rail line by a noncarrier and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901.<sup>11</sup> The Detroit Partnership was designed to be a noncarrier partnership but it was set up to hold, operate, manage, maintain, and deal with the Tunnel assets and to acquire the N-D

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<sup>9</sup> The definition of "control" in 49 U.S.C. 10102(3) includes "actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means." Control of a carrier for which 11323 authorization is required embraces the power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee the day-to-day affairs of that carrier. Soo Line Railroad Company-Petition for Declaratory Order, STB Finance Docket No. 33350 (STB served Feb. 3, 1998). The existence of control is an issue of fact to be determined by the circumstances of each case. Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939).

<sup>10</sup> Similarly, BTIT argues that it does not need authority under 49 U.S.C. 10901 to acquire its interest in the DRTC and its related United States assets because it will only own a 50 percent interest.

<sup>11</sup> Under the licensing provisions of 49 U.S.C. 10901(a)(4), a noncarrier may "acquire a railroad line or acquire or operate an extended or additional railroad line" only if the Board makes an express finding that the proposal is not inconsistent with the "public convenience and necessity."

Partnership's interests relating to the Tunnel, including the Tunnel lease.<sup>12</sup> Similarly, Niagara Partnership was designed to be a noncarrier partnership but it was set up to maintain, manage, work and operate the Niagara Bridge and CSR after acquiring those assets from CNR and CPR.<sup>13</sup> Thus, BTIT and CNR would not need the Board's authorization for these transactions, but Detroit Partnership and Niagara Partnership would require authorization under section 10901 to acquire the rail assets formerly held by N-D Partnership. Accordingly, we will proceed with the consideration of exemptions for Detroit Partnership and Niagara Partnership.

As noted, CPR appears to have increased its operational control over the Tunnel. Under the new Detroit Partnership, CPR will be responsible for dispatching trains and otherwise controlling operations in the Tunnel. While the matter is not free from doubt on this record, it appears that CPR would need Board approval under section 11323-25, to exercise this control. On our own motion, and in an abundance of caution, we will grant CPR an exemption under 49 U.S.C. 10502 to exercise the control described in these transactions to the extent that authorization is needed.

The Sua Sponte Exemptions. The acquisition of a rail line or rail assets by an entity that is not a rail carrier requires prior approval by the Board under 49 U.S.C. 10901. Under 49 U.S.C. 10502(a), however, we must exempt a transaction or service from regulation if we find that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is limited in scope; or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed acquisitions by the Detroit Partnership and the Niagara Partnership is not necessary to carry out the rail transportation policy. Rather, exemptions will promote that policy by minimizing the need for Federal regulatory control over the transactions and reducing regulatory barriers to entry [49 U.S.C. 10101(2) and (7)] and ensuring that a sound rail transportation system will continue to meet the needs of the shipping public [49 U.S.C. 10101(4)]. The Detroit Partnership and Niagara Partnership will maintain the same level of transportation services currently provided, thus fostering sound economic conditions in

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<sup>12</sup> Some of the information respecting the Detroit Partnership and Niagara Partnership was submitted under seal. We have found it necessary to put some of this information in the public record to explain our determinations in this decision. See CSX Corp. et al. – Control – Conrail Inc. et al., 3 S.T.B. 196, 455 n.417 (1998).

<sup>13</sup> Our analysis is based on the limited information contained in the parties' filings, including portions of their draft agreements. While the parties' filings reflect some intention on their part to submit their final agreements later, the records in these proceedings reflect no such filings.

transportation, ensuring effective coordination among carriers, and encouraging efficient management [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the acquisitions by the Detroit Partnership and by the Niagara Partnership is not needed to protect shippers from an abuse of market power. There are no adverse impacts on rail operations or any lessening of rail competition as a result of the proposed transactions. Given our finding regarding the probable effect of the transactions on market power, we need not determine whether the transactions are limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of employees. However, under section 10901(c), labor protective conditions are not imposed in acquisitions by noncarriers such as Detroit Partnership and Niagara Partnership.

These transactions are exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) because they will not result in any significant change in carrier operations. Similarly, the transactions are exempt from the historic reporting requirements under 49 CFR 1105.8(b)(3) because they will not substantially alter or change the level of maintenance of railroad properties.

Regarding CPR's acquisition of control, including its increased operational control of the Tunnel, the Board's prior approval appears to be required under 49 U.S.C. 11323. Detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. 11323-25 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce barriers to entry and exit [49 U.S.C. 10101(7)]. An exemption will also promote a safe and efficient rail transportation system, ensure coordination between rail carriers, and encourage efficient management [49 U.S.C. 10101(3), (5), and (9)]. Regulation of the transaction is not needed to protect shippers from an abuse of market power because the transaction will not result in adverse changes in service levels or significant operational changes. This transaction also is exempt from environmental and historic reporting requirements for the reasons stated above.

Under 49 U.S.C. 10502(g), however, we may not use our exemption authority to relieve a rail carrier of its statutory obligation under 49 U.S.C. 11326 to protect the interests of employees. Accordingly, we will impose the labor protection conditions in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), which are the standard labor protective conditions imposed in section 11323 transactions.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 33984, on our own motion, an exemption from 49 U.S.C. 10901 is granted under 49 U.S.C. 10502 to allow the Detroit Partnership to acquire the United States interests of N–D Partnership relating to the Detroit River tunnel, as set forth above.

2. In STB Finance Docket No. 34005, on our own motion, an exemption from 49 U.S.C. 11323-25 is granted under 49 U.S.C. 10502, as conditioned above, to allow CPR to exercise the control described in these transactions.

3. In STB Finance Docket No. 34007, on our own motion, an exemption from 49 U.S.C. 10901 is granted under 49 U.S.C. 10502 to allow the Niagara Partnership to acquire the non-Tunnel United States interests of N–D Partnership, as set forth above.

4. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams  
Secretary